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No. 15-6092

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD MATHIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court may employ the "modified categorical approach" under Taylor v. United States, 495 U.S. 575 (1990), and Descamps v. United States, 133 S. Ct. 227 (2013), to determine whether a defendant was convicted of a crime constituting a predicate offense under the Armed Career Criminal Act of 1984 (such as generic "burglary"), when a defendant has been convicted under a state statute that sets out, in the alternative, several forms of committing an offense, or whether instead the applicability of the modified categorical approach depends on a state-law inquiry into whether the alternative forms of the offense represent "means" or "elements."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 786 F.3d 1068.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2015. A petition for rehearing was denied on June 23, 2015 The petition for a writ of certiorari was filed on September 15, 2015. The jurisdiction of this Court is invoked under 28 U.S C. 1254(1)

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. 3. He was sentenced as an armed career criminal under 18 U.S.C. 924(e) to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. 3. The court of appeals affirmed. Id. at 1-13.

1. The Armed Career Criminal Act of 1984 (ACCA) increases the statutory maximum sentence, and requires a 15-year mandatory minimum sentence, if a defendant is convicted of being a felon in possession of a firearm following "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

18 U.S.C. 924(e)(2)(B).[1] This Court, in turn, has construed "burglary" under the ACCA ("generic burglary") as a crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 599 (1990). Conversely, "burglary" under the ACCA does not include unlawful entry into other places, "such as automobiles and vending machines." Ibid.

Courts typically use a "categorical" approach to determine whether a prior conviction is for a violent felony under the ACCA. See Taylor, 495 U.S. at 600. Under that approach, they examine "the statutory definition[]" of the crime of conviction, in order to determine whether a jury would have necessarily had to find conduct constituting an ACCA predicate offense in order to convict. Ibid. Accordingly, to determine whether a defendant was convicted of "burglary" as that term is used in the ACCA, a court would examine whether the statute of conviction reached only "unlawful or unprivileged entry into, or

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[1] In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held void for vagueness the portion of the ACCA that designates as violent felonies convictions for conduct that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B). That decision did "not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." Johnson, 135 S Ct. at 2563

remaining in, a building or structure with intent to commit a crime." Id. at 599. The court would not, however, inquire into "the particular facts underlying" a defendant's convictions. Id. at 600.

In a variation on that approach that is often referred to as the "modified categorical approach," courts may also "go beyond the mere fact of conviction to the charging paper and jury instructions" in a "narrow range of cases where a jury was actually required to find all the elements of generic burglary" or of another ACCA predicate offense, in order to return a conviction. Taylor, 495 U.S. at 601; see Shepard v. United States, 544 U.S. 13, 17 (2005) (addressing documents that may be permissibly consulted in a guilty-plea case). This approach is permissible only when the statute of conviction is "divisible -- i.e., comprises multiple, alternative versions of the crime," and a court is able to use conviction documents "to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." Descamps v. United States, 133 S. Ct. 2276, 2285 (2013).

2. After police investigating the disappearance of a 15-year-old boy tracked the missing child to petitioner's home and conducted a search pursuant to a warrant, petitioner was arrested for being a felon in possession of a firearm. The police investigation began when the 15-year-old boy, referred to

in court documents as "K.G.," went missing. Police tracked the boy's cellular phone to petitioner's house. Petitioner's girlfriend answered the door, falsely claimed that petitioner was not home, and asserted that she did not know K.G.'s whereabouts. In fact, as petitioner's girlfriend later admitted, petitioner was inside the home with K.G. and two other young males. Later that night, petitioner returned K.G. to the home of K.G.'s grandmother. K.G. subsequently disclosed to the police that petitioner had forcibly molested him. After K.G. reported the sexual abuse, police obtained and executed warrants to search petitioner's residence. There, they found a loaded rifle and ammunition, as well as electronic evidence indicating that petitioner was engaging in sexually explicit communications with underage males and arranging to bring underage males to his home. Pet. App. 2.

Based on the evidence recovered in the search of petitioner's residence, petitioner was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He pleaded guilty. Pet App. 3.

The government argued that petitioner was subject to the ACCA because petitioner had six convictions that qualified as "violent felonies" under the ACCA. Gov't Sentencing Memorandum, D. Ct. Doc. 55 at 1 (Sent. Mem.) (May 6, 2014). The government argued that petitioner's felony conviction for interference with

official acts causing serious injury constituted a violent felony, because that crime has as an element the use of force against a person of another. Id. at 6-7 (citing United States v. Malloy, 614 F.3d 852, 859-860 (8th Cir. 2010), cert. denied, 131 S. Ct. 3023 (2011)).

In addition, the government argued that petitioner's five convictions for "burglary" in violation of Iowa law were violent felonies because they were convictions for "burglary" under the ACCA. Sent. Mem. 3. The government acknowledged that Iowa's burglary statute sweeps more broadly than "burglary" under the ACCA -- "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime" -- because Iowa's law applies to vehicles as well as buildings. Ibid. (quoting Taylor, 495 U.S. at 599); Iowa Code Ann. § 713.1 (1989) (explaining that burglary constitutes unlawful entry into any "occupied structure"); see Iowa Code Ann. § 702.12 (1989) (defining "occupied structure" to reach not only "any building [or] structure" but also any "appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value," excluding any "box, chest, safe, changer, or other object or device which is adapted or used for the deposit or

storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it").[2]

The government argued, however, that application of the modified categorical approach established that petitioner's convictions were for ACCA burglary. It explained that "[i]f an overbroad statute specifies alternative methods of committing the offense, some of which fit the generic definition of burglary and some of which do not, the statute is divisible." Sent. Mem. 3 (citing Descamps, 133 S. Ct. at 2282 (describing a "divisible statute[]" as one that "sets out one or more elements of the offense in the alternative -- for example, stating that burglary involves entry into a building or an automobile")). Here, the government argued, petitioner's five burglary convictions were for generic "burglary" under the ACCA, because he was convicted of burglarizing buildings and structures rather than vehicles or other places not covered by the generic offense. Id. at 4-5. In particular, the government noted,

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[2] The courts below conducted their analysis using the provisions of the Iowa Code in effect in 1989, because those provisions were in effect at the time of four of petitioner's five burglary convictions. Pet. App. 8 n.8. These convictions included two convictions that constituted generic federal burglary because they were convictions for burglary of buildings. See id. at 11-12 (concluding that petitioner's convictions for breaking and entering "garages" were convictions for burglary of buildings under Iowa law).

petitioner had been charged with, and convicted of, unlawfully entering (1) a "house and garage," (2) a "garage," (3) a "garage," (4) a "machine shed," and (5) a "storage shed." Ibid.; Gov't C.A. Br. Addendum 1-14.

The district court agreed. It concluded that Iowa's statute setting out various forms of burglary was divisible under Descamps, supra. 7/10/14 Sent. Tr. 15-16; see Pet. App. 3. And it agreed that the indictments resulting in petitioner's burglary convictions showed that, in each case, petitioner had been convicted of generic burglary -- unlawful entry into buildings or structures with the intent to commit a crime. Pet. App. 3; 7/10/14 Sent. Tr. 16.[3] The court also agreed that petitioner's conviction for interference with official acts inflicting serious injury qualified as a "violent felony" under the ACCA, relying on an Eighth Circuit decision concluding that offense "has as an element the use, attempted use, or threatened use of physical force against the person of another," Malloy, 614 F.3d at 860. See 7/10/14 Sent. Tr. 16. Because the court concluded that these six convictions were for "violent felonies," it found that petitioner was subject to the ACCA.

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[3] In the alternative, the district court concluded that petitioner's burglary convictions qualified as violent felonies under the ACCA's residual clause. 7/10/14 Sent. Tr. 16. This Court subsequently held the residual clause void for vagueness in Johnson. See 135 S. Ct. at 2563; note 1, supra.

Ibid. The court sentenced petitioner to 15 years of imprisonment. Pet. App. 3, 42-44.

3. The court of appeals affirmed. Pet. App. 1-13. As relevant here, the court agreed that petitioner was an armed career criminal under the ACCA, relying on petitioner's conviction for interference with official acts inflicting serious injury (which petitioner did not dispute was an ACCA predicate), id. at 4 n.2, and at least two of petitioner's Iowa burglary convictions, id. at 11-12.

In considering petitioner's Iowa burglary convictions, the court of appeals held that the Iowa burglary statute is divisible and, therefore, the modified categorical approach was available to determine whether petitioner was convicted for generic burglary within the meaning of the ACCA. The court explained that Iowa's burglary statute "exhibits the exact type of divisibility" discussed in Taylor and Shepard, because Iowa law sets out in the alternative "a set of elements that conforms with generic burglary" ("entry into a 'building' or 'structure'") and another set that does not ("entry into a 'land, water, or air vehicle.'"). Pet. App. 9 (quoting Iowa Code Ann § 702.12 (1989)).

Petitioner had asserted that burglary was not a divisible offense under Iowa law. In his view, jurors were not required to find unanimously which type of location was burglarized by a

particular defendant, and, therefore, the statute set out alternative "means" of committing burglary, rather than alternative elements. Pet. App. 10 (explaining that, in petitioner's view "'jurors need not all agree on whether' [a defendant] burgled a building, a boat, or a car.'") (citation omitted). The court of appeals acknowledged that the issue was "a matter that splits our sister circuits." Id. at 10 n.6 (citing cases).[4] The court then concluded that when a statute set out several alternative forms of an offense, and conviction documents established the alternative form that had been the basis for the charge and conviction, no further inquiry was required into whether, under state law, the alternative forms of the offense constituted "means" or "elements" in the sense described by petitioner. Id. at 10. The court explained that petitioner's proposed "means/elements distinction * * * was expressly rejected in Descamps," this Court's most recent case explicating the modified categorical approach. Ibid.; see ibid. (quoting Descamps's statement that "[w]hen a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to

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[4] The court of appeals compared, for example, Rendon v. Holder, 764 F.3d 1077, 1086 (9th Cir. 2014) (requiring alternative elements, rather than means), with United States v. Prater, 766 F.3d 501, 510 (6th Cir. 2014) (finding a state burglary law divisible when it listed alternative burglary locations with an "or").

those of the generic offense") (quoting 133 S. Ct. at 2285 n.2)).[5]

After concluding that the modified categorical approach was applicable, the court of appeals examined the charging documents that corresponded to petitioner's Iowa burglary convictions. Pet. App. 11. The court noted that petitioner "was charged with and convicted of entering garages in relation to two of his burglary convictions" and that "[b]ecause a garage is clearly a 'building,'" and burglary of a "building" constitutes burglary under the ACCA, petitioner was convicted under the portion of Iowa's burglary statute "that conforms with generic burglary." Id. at 11-12. The court concluded that these burglary

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[5] The court of appeals stated that petitioner's case also implicated "another split," concerning whether courts may apply the modified categorical approach when the alternative forms of an offense are specified in part through a definitional "statute or subsection, outside of the convicting statute." Pet. App. 11 n.7. The court stated that its cases, and those of a number of other circuits, permitted courts to consider "definitions of defined terms outside the convicting statute" in determining whether state law set out multiple offenses in the alternative for purposes of the modified categorical approach. Ibid. (citing United States v. Hockenberry, 730 F.3d 645, 669 (6th Cir. 2013), cert. denied, 134 S. Ct. 1044 (2014); United States v. Herrera-Alvarez, 753 F.3d 132, 139-140 (5th Cir. 2014); United States v. Martinez, 756 F.3d 1092, 1095-1096 (8th Cir. 2014); United States v. Bell, 445 F.3d 1086, 1090 (8th Cir. 2006); United States v. Trent, 767 F.3d 1046, 1056 (10th Cir. 2014), cert. denied, 135 S. Ct. 1447 (2015)). It noted that a Ninth Circuit decision had "declin[ed] to consult a separate statute that defined the term 'custody'" when determining whether an "escape" statute was divisible. Ibid. (discussing United States v. Simmons, 782 F.3d 510 (2015)).

convictions, together with petitioner's conviction for interference with official acts inflicting serious injury, established that petitioner was an armed career criminal under the ACCA. Id. at 12.

DISCUSSION

Petitioner contends (Pet. 5-10) that this Court should grant a writ of certiorari to resolve a conflict in the courts of appeals concerning when the modified categorical approach applies. The United States agrees that this Court's review is warranted. The court of appeals correctly held that when a defendant is convicted under a state statute that sets out several alternative forms of committing an offense, some of which are generic and some not, a court may examine the conviction records to determine whether the defendant was necessarily convicted of a form of the offense that qualifies as generic, without inquiring into whether the alternative constitutes a "means" or an "element" under state law. The courts of appeals, however, have reached conflicting conclusions on this precise issue. Because whether a statute is "divisible," such that the modified categorical approach may be applied, is a recurring question of substantial importance, and this case is an appropriate vehicle in which to address the question, the petition for a writ of certiorari should be granted.

1. The court of appeals correctly held that a state statute is divisible when it sets out alternative methods of committing an offense, some of which constitute the generic form of the offense and some do not. A court may then employ the modified categorical approach and examine the documents underlying the defendant's conviction to determine whether the defendant was convicted of a form of the offense that satisfies the generic federal definition. No further inquiry into the status of the alternatives under state law as "means" or "elements" is required.

That approach reflects this Court's consistent explanation of the modified categorical approach. In Taylor v. United States, 495 U.S. 575 (1990), this Court explained that whether a defendant had been convicted of a predicate offense for purposes of ACCA turns on "the statutory definition of the prior offenses" rather than "the facts underlying the prior convictions." Id. at 600. The Court noted, however, that some States "define burglary more broadly [than the generic definition relevant under the ACCA], e.g., by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings." Id. at 599, 602. With respect to convictions under such broader burglary statutes, the "categorical approach * * * may permit the sentencing court to go beyond the mere fact of conviction"

and examine whether, for example, "a jury was actually required to find all the elements of generic burglary." Id. at 602. If the conviction documents establish that a defendant was charged with, and pleaded guilty to, a form of burglary that qualifies as an ACCA predicate, "the Government should be allowed to use the conviction for enhancement." Ibid.

In Shepard v. United States, 544 U.S. 13 (2005), the Court reaffirmed Taylor's recognition that when a defendant has been convicted of violating a statute that sets out multiple crimes in the alternative, a court may review certain reliable conviction records to determine whether the conviction establishes that a jury necessarily found (or the defendant necessarily admitted) an ACCA predicate. Shepard addressed the application of the modified categorical approach to the Massachusetts burglary statute which, like Iowa's burglary statute, reaches beyond generic burglary's coverage of entries into buildings and structures, "by extending [burglary] to entries into boats and cars." Id. at 16. Shepard concluded that, in the context of a guilty plea under an overbroad statute of this type, a court could consider "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information," id. at 26, in

order to determine "whether the plea had 'necessarily' rested on the fact identifying the burglary as generic," id. at 21 (quoting Taylor, 495 U.S. at 602).

Most recently, in Descamps v. United States, 133 S. Ct. 2276 (2013), this Court expressly rejected the contention that the applicability of the modified categorical approach depends on a state-law inquiry into whether, in a case in which multiple forms of a single offense were charged, jurors would need to be unanimous about the form of the offense that the defendant had committed. To illustrate the circumstances in which the modified categorical approach could be applied, the Court in Descamps compared a hypothetical aggravated assault statute forbidding assault with any of eight specified weapons with an assault statute that requires an indeterminate weapon. The Court explained that the first statute would, by virtue of its structure, be a divisible statute to which the modified categorical approach applied, but the second statute would not be. Id. at 2289-2290. The Court also expressly rejected the dissent's contention that its approach to divisibility would require state-law inquiries, because the appropriate analysis proceeds from the Taylor- and Shepard-approved documents:

> Whatever a statute lists (whether elements or means), the documents we approved in Taylor and Shepard -- i.e., indictment, jury instructions, plea colloquy, and plea agreement -- would reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted

> in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Id. at 2285 n.2.

Descamps made explicit what follows logically from Taylor and Shepard: a court need not "parse state law" to determine whether a statute that provides alternatives (some generic, some not) is divisible. Rather, the existence of statutory alternatives is sufficient. Applying this approach, the courts below correctly concluded that petitioner qualifies as an armed career criminal, relying on at least two of petitioner's Iowa burglary convictions and a further undisputed ACCA predicate. As the court of appeals explained, Iowa's burglary statute, Iowa Code Ann. § 713.1 (1989), sets out several forms of burglary through an enumerated list of alternative locations that can be burglarized, Iowa Code Ann. § 702.12 (1989). That list makes Iowa burglary broader than the generic offense, because it covers entry not only into a "building" or "structure," but also into "a land, water or air vehicle." Pet. App. 9. Conviction documents established that in at least two of his cases, petitioner had been convicted of forms of Iowa burglary that constituted federal generic burglary for ACCA purposes -- namely, the burglary of a building or structure. Id. at 11-12. Accordingly, the courts below correctly classified petitioner as an armed career criminal.

2. As the court below noted, in the wake of Descamps, a conflict has emerged in the courts of appeals concerning whether a state statute that sets out several alternative forms of an offense is divisible only if state law would require jurors to be unanimous on the form of the offense committed. Pet. App. 10 n.6 ("We recognize the means/elements distinction is a matter that splits our sister circuits."). This conflict is deep and widespread and extends to both criminal and immigration cases.

In addition to the Eighth Circuit in this case, the Sixth and Tenth Circuits have rejected state-law inquiries into whether juror unanimity is required on a statutory alternative to determine whether a statute providing alternatives is divisible. Pet. App. 1-13; United States v. Ozier, 796 F.3d 597, 601-602 (6th Cir. 2015); United States v. Trent, 767 F.3d 1046, 1057 (10th Cir. 2014), cert. denied, 135 S. Ct. 1447 (2015). In those circuits, when a defendant has been convicted under a state statute that sets out multiple versions of a crime in the alternative, a court may examine conviction records to ascertain whether the records conclusively establish that the defendant was convicted under a portion of the statute that satisfies a generic federal definition (such as burglary). No further inquiry is required into whether state law provides that in every case, jurors must be unanimous on which of the alternative forms of the offense was the basis of the

defendant's conviction. Pet. App. 10-12; United States v. Ozier, 796 F.3d at 601-602 ("Descamps expressly rejected defendant's finite parsing of state law as to the difference between 'means' and 'elements'"); United States v. Trent, 767 F.3d at 1061 ("[N]o Supreme Court opinion addressing the modified categorical approach has ever found it appropriate to examine whether an alternative statutory phrase is an 'element'" in the sense of requiring juror unanimity under state law).

The Fourth and Ninth Circuits, in contrast, require such an inquiry into state law. In Rendon v. Holder, 764 F.3d 1077 (2014), a panel of the Ninth Circuit concluded, based on its interpretation of Descamps, that statutes setting out alternative forms of an offense are divisible only if, under state law, jurors would be required to be unanimous as to the form of the offense the defendant committed. Id. at 1086 ("[I]t is black letter law that a statute is divisible only if it contains multiple alternative elements, as opposed to multiple alternative means"; therefore, disjunctive statutes are divisible "[o]nly when state law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute"). The Ninth Circuit denied en banc review, over the dissents of nine judges in two published opinions. See Rendon v. Holder, 782 F.3d 466, 467-473 (2015)

(Graber, J., dissenting from the denial of rehearing en banc); id. at 473-474 (Kozinski, J., dissenting from denial of rehearing en banc). Judge Graber explained that the panel had "ignored, without explanation," this Court's "clear command" and "holds that we must do precisely what the Court instructed us not to do: parse state law to determine whether the statutory alternatives are elements or means." Id. at 467. Noting that the issue is "exceptionally important" because of the widespread use of "[t]he modified categorical approach" in "both immigration and criminal cases," she criticized an approach that will require courts "to delve into the nuances of a seemingly endless variety of state laws in order to determine whether, in the abstract, a jury must unanimously agree as to which statutory alternative the defendant committed -- a notoriously uncertain inquiry." Id. at 471 (capitalization altered). Judge Kozinski added that "[g]iven the degree of conflict and confusion amongst the circuits, the Supreme Court will surely revisit this issue sooner rather than later." Id. at 474.[6]

The Fourth Circuit has also interpreted Descamps to require an inquiry into the state-law elements that a jury must find unanimously, in order to determine whether a statute is

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[6] Rendon was an immigration case, but the categorical and modified categorical approaches are also applied in immigration cases. See Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 186-187 (1990); Rendon, 764 F.3d at 1082.

divisible. Omargharib v. Holder, 775 F.3d 192, 198-199 (2014) (following Rendon in holding that "a crime is divisible under Descamps only if it is defined to include multiple alternative elements (thus creating multiple versions of a crime), as opposed to multiple alternative means (of committing the same crime)," noting that "[e]lements, as distinguished from means, are factual circumstances of the offense the jury must find unanimously and beyond a reasonable doubt") (internal quotation marks omitted); United States v. Fuertes, 805 F.3d 485, 498 (2015). Judge Niemeyer concurred in Omargharib to note his view that Descamps was "the source of * * * confusion" concerning the scope of the modified categorical approach. 775 F.3d at 201. He wrote that "[w]ere the Supreme Court willing to take another look at this area of law, it might well be persuaded" to revisit the approach he understood Descamps to reflect. Id. at 202.[7]

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[7] The Board of Immigration Appeals also concluded in a published decision arising from an immigration proceeding that if a statute sets out alternative offenses, the modified categorical approach may be used only if, under state law, jurors would be required to agree as to which alternative form of the offense had been committed. In re Chairez-Castrejon, 26 I. & N. Dec. 349 (2014), reconsideration granted in part and denied in part, 26 I. & N. Dec. 478 (2015). Subsequently, however, the Attorney General directed that the Board refer its decision in Chairez-Castrejon and in another case to her for review, in order to address the "proper approach for determining 'divisibility' within the meaning of" Descamps. In re Chairez-Castrejon and Sama, 26 I. & N. Dec. 686 (B.I.A. 2015). The

Absent this Court's intervention, the conflict over how to apply the modified categorical approach will persist. The Ninth Circuit denied rehearing en banc over nine dissenting votes in Rendon, and the circuits that have rejected its approach show no sign of moving to the other side of the split. Geographic disparity on such a basic question in implementing the modified categorical approach leads to disparate treatment of similar cases and hinders uniform national administration of important federal laws.[8]

Attorney General set a schedule for briefing that extends through January 2016. Ibid.

[8] Petitioner suggests that "[t]here is a circuit split on whether the modified categorical approach should extend to statutory definitional provisions that are separate from, but serve to explain, terms used in a statute of conviction." Pet. 5 (citing Pet. App. 11 n.7). But the decision that petitioner and the court of appeals perceived to generate a conflict on this subject did not in fact adopt a rule that definitional provisions always set out means on which jurors need not agree. See United States v. Simmons, 782 F.3d 510, 516-517 (9th Cir. 2015). Instead, that decision simply applied Rendon in holding that the particular definitional provision before it set out alternative means under state law. Id. at 517 ("Hawaii law makes clear that none of the three 'modes' of custody set forth in" the definitional provision "needs to be proven in order to convict a defendant"). And contrary to petitioner's contention, no reason exists to ignore definitional provisions in determining divisibility. Petitioner contends that definitional provisions are "by their nature explanatory and descriptive of * * * means," rather than "elements," Pet. 7. But as discussed above, the "means" versus "elements" distinction is not controlling. And, in any event, no reason exists why definitional provisions cannot provide alternative discrete elements of criminal liability, depending on state law

3. The question presented implicates a recurring issue of substantial importance, and this case presents an appropriate vehicle for resolving it.

a. The modified categorical approach "arises frequently in both immigration and criminal cases." Rendon, 782 F.3d at 471 (Graber, J., dissenting from denial of rehearing en banc). In the criminal context, the categorical and modified categorical approaches are used not only under the ACCA, but also under the Sentencing Guidelines, which increase the recommended sentences for certain defendants who have prior felony convictions for crimes of violence or controlled substance offenses. See, e.g., Sentencing Guidelines §§ 4B1.1, 4B1.2.

The categorical and modified categorical approaches are also used in the immigration context, to determine whether an alien has been convicted of an offense that triggers civil or criminal immigration-related consequences. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., provides for the removal from the United States of aliens convicted of specified types of crimes, whether committed in violation of state or federal law or the law of another country. See 8 U.S.C. 1182(a)(2); 1227(a)(2); 1227(a)(2)(A)(iii). In addition, an alien convicted of a crime within the most serious of these INA categories -- the "aggravated felony" category -- also faces a higher statutory maximum and a higher Sentencing Guidelines

range if the alien illegally reenters the country after being removed and is prosecuted for that crime, see 8 U.S.C. 1326(b)(2); Sentencing Guidelines § 2L1.2(b)(1)(C). And where the modified categorical approach is potentially applicable, the approach to divisibility will often determine whether an alien who has committed a serious crime may remain in the country.

b. Petitioner's case is a suitable vehicle in which to address the divisibility question on which the courts of appeals are divided. The question was squarely decided in a published opinion by the court below. And because petitioner has only one ACCA predicate that is not a burglary conviction under Iowa law, petitioner's status as an armed career criminal depends on whether his Iowa burglary offenses may constitute ACCA predicates.

Several later-filed petitions decisions present the same or similar questions for review, but none is a superior vehicle. See Patrie v. United States, petition for cert. pending, No. 15-6468 (filed Oct. 8, 2015); Evenson v. United States, petition for cert. pending, No. 15-6561 (filed Oct. 14, 2015); Goodwin v. United States, petition for cert. pending No. 15-6603 (filed Oct. 16, 2015); Boaz v. United States, petition for cert. pending, No. 15-6645 (filed Oct. 20, 2015); Castro-Martinez v. United States, No. 15-7106 (filed Nov. 17, 2015). The petitions in Evenson and Castro-Martinez are less suitable vehicles

because the petitioners seek to challenge the application of the advisory Sentencing Guidelines. The petition in Boaz is a less suitable vehicle because the petitioner is challenging the denial of his late-filed motion for post-conviction relief under 28 U.S.C. 2255. And the petitions in Patrie and Goodwin seek review from Eighth Circuit decisions that principally relied on the decision below, and therefore do not contain as detailed an analysis of the issue that has divided the courts of appeals. Accordingly, this case presents a superior vehicle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2015

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES**, via email and by first-class mail, postage prepaid, this 17th day of December, 2015.

[See Attached Service List]

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